No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working people.[1] The AFL-CIO has a strong interest in employees being able to represent and join with one another to enforce their rights under the Fair Labor Standards Act (FLSA) and other federal and state labor standards laws.

SUMMARY OF THE ARGUMENT

I. Tyson waived any objection to this case proceeding as a collective action under § 216(b) by not adequately presenting the issue in its brief. The issue is an important one to all employees covered by the FLSA and one of first impression in this Court, yet Tyson makes no argument in support of its position. Rather, Tyson makes the bald and unsupportable assertion that the standards for determining whether employees are "similarly situated" under § 216(b) "can be no less stringent" than those applied under Rule 23(b)(3). But § 216(b) and Rule 23(b)(3) differ on their face; have different origins, distinct purposes, and vastly different scopes; and operate in "fundamentally different" manners. *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523, 1529 (2013). Thus,

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[1] Counsel for the petitioner and counsel for the respondent have filed letters with the Court consenting to the filing of *amicus* briefs on either side. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

the overwhelming majority of lower federal courts have rejected Tyson's position, specifically in relation to the predominance requirement.

II. The District Court did not abuse its discretion in certifying the Rule 23(b)(3) class despite variation in the hours worked by "gang time" employees. The Rule requires only that common questions "predominate." "[Q]uestions affecting only individual members" of the class can exist, including questions relating to damages.

Tyson's argument is not actually about certification of the class, but about the quality of the evidence introduced at trial concerning hours worked. But even assuming that evidence was somehow deficient, any error at trial does not infect the certification decision. Viewed from the perspective of the trial judge deciding the motion to certify a class, the common questions predominated because the individual questions did not require wholly individualized proof and could have been efficiently tried in a number of ways, including that employed by Plaintiffs, without overwhelming the common questions.

This Court's holding in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), permitting employees to prove how many hours they worked "as a matter of just and reasonable inference" when their employer has reached its duty to keep records applies both to proof that the employees worked more than 40 hours and to proof of how many more. But application of *Mt. Clemens* is not necessary to hold that Plaintiffs could and did prove hours worked using appropriate representative proof that did not overwhelm the fully common questions.

III. The District Court did not abuse its discretion by certifying the Rule 23(b)(3) class despite the fact that it was likely some members never worked more than 40 hours in a week because Plaintiffs' evidence identified such employees and the judge's instructions insured that their claims did not add to the jury award and that they did not share in that award. Under Tyson's reading of Rule 23(b)(3), the only individual questions that could exist would be about the amount of damages contrary to the unambiguous text of the Rule. Tyson's reading would preclude certification in almost every case.

IV. If this Court decides that Tyson has not waived its objection to the case proceeding as a collective action under § 216(b), it should hold that the District Court did not abuse its discretion in so permitting because the more stringent standards of Rule 23(b)(3) were met and because each of the criteria identified by the lower federal courts applying the similarly situated standard supports the conclusion that the employees were so situated here.

ARGUMENT

Introduction

Four preliminary points place this case in context.

1. The employees at issue all work in Tyson's Storm Lake Iowa pork processing plant. The work they perform is hard, demanding and dirty. *See* J.A. 51-52 (on Cut Line), 58-59 (on Slaughter Floor), 67 (on Retrim Line),[2] 118 (generally). For example,

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[2] The Processing Floor includes the cut and retrim lines. J.A. 146.

one "Splitter" testified that he uses a 200lb saw with an 18 inch blade to cut about 17 hogs in half per minute. J.A.303-05. The employees earn between $11 and $15.50 per hour (or between $23,000 and $32,000 per year). J.A. 122. The employees all alleged that they were not compensated as required by the federal FLSA and the Iowa Wage Payment and Collection Law for time spent performing required tasks at the start and end of their work day, such as donning and doffing protective garments, sanitizing knives and other equipment, and traveling to and from their work stations.

Tyson and many of its *amici* seek to characterize this case as being about "enterprising lawyers and their experts." Chamber Br. 19. But, as this Court held over a half century ago, here, "we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion." *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 592 (1944).

2. The Rule 23 class and the subset thereof that joined the action pursuant to 29 U.S.C. § 216(b) are relatively small (3,344 and 444 respectively), clearly defined, and "sufficiently cohesive." *Amgen v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184, 1196 (2013).

All the employees work for a single employer at a single plant. J.A. 117. Even more specifically, all the employees work on two floors of the plant, the Slaughter or "Kill" floor and the Processing or "Fabrication" floor. They do similar work using similar tools and wearing similar protective clothing.

All the employees are paid according to the same system. The fact that that pay system—unique to members of the class—is denominated "*gang* time" by Tyson itself further evidences the cohesive nature of the group. Pet.App. 45a-46a (emphasis added). The method used to calculate employees' base compensation does not vary by individual. Rather, each employee starts getting paid when the first hog "hits the floor" and stops getting paid when the last hog "hits the floor." *Id.* Every employee spends additional time before and after the start and end of such "gang time" changing in and out of protective clothing, preparing and cleaning tools, and traveling to and from their work stations, but no "gang time" employee is compensated for the precise amount of time spent performing those required tasks. Pet.App. 47a-48a.

Tyson's own practices evidence the cohesiveness of the class in relation to the precise question at issue here. Not only did Tyson not compensate all members of the class based on the actual time each individual spent performing required tasks at the start and end of the day, Tyson itself considered the time the individuals spent engaged in such activities to be sufficiently similar that it paid them the same, lump-sum amount to compensate them for the time. J.A. 48, 65, 121, 432. In fact, Tyson calculated the extra pay using methods that closely parallel the proof in this case. J.A. 434, 437 ("the industrial engineer will do their [sic] study to determine how many minutes" for each position), 437 ("That's what the K-code is. It is the amount of time that we expect you to do that pre and post-shirt activity [in].")

3. The injuries in this case are precisely the type that class and collective actions were designed to enable individuals to remedy in court. The average damage award was $846.94 ($2,892,378.70/3,344). Without access to class and collective actions, these employees and others similarly situated who have been illegally deprived of small amounts of pay will be unable, as a practical matter, to enforce their statutory rights. As Judge Posner observed in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 776 (7th Cir. 2013), "Although each class member claims to have lost several thousand dollars as a result of [the employer]'s alleged [wage and hour] violations, that isn't enough to finance a modern federal lawsuit; it is class treatment or nothing."

Even more specifically, Congress intended § 216(b) of the FLSA to enable groups of workers to recover unpaid wages in amounts that are small in relation to the cost of litigation, but nevertheless crucial to the well-being of the workers. *See Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989). When Congress amended § 216(b) in 1947, claims of the precise type at issue here, for compensation for start and end of the day activity and walking time – for "portal-to-portal" pay – were *the* central focus of the debate. And Congress decided to leave untouched employees' rights *both* to compensation for clothes changing that is "an integral part of and indispensable to their principal activities" and to walking time once such "principal" activities have begun *as well as* to sue on behalf of others "similarly situated," while it revised other parts of the FLSA, including § 216(b). *Steiner v. Mitchell*,

350 U.S. 247, 255 (1956); *IBP, Inc. v. Alvarez*, 546 U.S. 27, 37 (2005); *infra* at 12 n. 9.

4. Finally, the sole non-common question alleged by Tyson is entirely the product of Tyson's violation of the law. Tyson was required by law to keep accurate records of all hours worked by its employees each week. *See* 29 U.S.C. § 211(c); 29 C.F.R. § 516.21(7); Iowa Code § 91A.6(1)(d). Had it done so, the calculation of the damages owed each class member would have been wholly mechanical.

In fact, Tyson used seven time clocks in the plant. If employees were one minute late, a clock recorded the time and their pay could be docked. J.A. 174. Tyson's Human Resource Manager acknowledged that that "the company has a time-system in place where it is administratively practical to keep up with the employees' time down to the minute." J.A. 175. Tyson could easily have instructed employees to punch in at the start of their first work activity and punch out at the conclusion of their last activity. J.A. 208-09. Yet the parties stipulated, "Tyson does not use such recorded time to determine an employee's compensable hours or pay." J.A. 120.

Tyson chose both to violate the substantive law and to ignore the record keeping requirements and now uses the consequences of the latter transgression to suggest that its employees cannot resort to a class or collective action and therefore cannot, as a practical matter, obtain a remedy for Tyson's violation of the substantive law.

I. Tyson Waived Any Objection to the Collective Action Under § 216(b) of the FLSA by Not Adequately Presenting the Issue In Its Brief

Tyson's brief does not address the § 216(b) issue with sufficient detail for this Court to reverse the court of appeals.[3] In full, Tyson's argument concerning § 216(b) occupies two pages and, as we explain below, contains no colorable argument. Pet. Br. at 25-27.[4]

A. The standard courts should apply in deciding whether to permit an action to proceed as a collective action under § 216(b) is an issue of first impression in this Court. The only decisions of this Court considering § 216(b), *Hoffmann-La Roche* and *Genesis*, in no way address the meaning of the term "similarly situated." The sole and "narrow question" presented in *Hoffman-La Roche* was "whether a district court conducting a suit [under § 216(b)] may authorize and facilitate notice of the pending action." 493 U.S. at 167, 169. This Court did not mandate or even approve a certification-type procedure, but held only "that district courts have discretion in appropriate cases, to implement 29 U.S.C. § 216(b) by facilitating notice to potential plaintiffs" and that "the District Court was correct to permit discovery of the names and addresses of the" similarly-situated employees for that purpose. *Id.* at 169-70. Nothing in the opinion speaks to the standards that

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[3] Tyson's Petition did not point to any split in the Circuits concerning § 216(b).

[4] Tyson's amici also make no relevant argument concerning § 216(b).

should apply to determine if employees are "similarly situated" for purposes of permitting such discovery and notice.

Genesis considered only whether an action brought as a collective action under § 216(b) "is justiciable when the lone plaintiff's individual claim becomes moot." 133 S.Ct. at 1526. In *Genesis*, the case was dismissed as moot before the trial court authorized it to proceed as a collective action and thus this Court had no occasion to consider the standards that should apply in making that determination.

Despite the fact that this Court has not addressed the question, Tyson asserts that "the standards governing certification[5] of a collective action under the FLSA can be no less stringent" than those under Rule 23(b)(3). Given the complete absence of relevant jurisprudence in this Court speaking to the standards applicable under § 216(b) and Tyson's complete failure to present any substantive argument on the issue, it would be unwise for this Court to address this important and unsettled issue. As then Judge Scalia stated, "the issue is one of first impression, and of major importance to all employees We will not resolve that issue on the basis of briefing and argument by counsel which literally consisted of no more than the assertion . . ., with no discussion of case law supporting that proposition or of the statutory text and legislative history relevant to the central question." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C.Cir. 1983). *See also, e.g., Borges v. Serrano-Isern*, 605 F.3d 1, 6 (1st Cir. 2010) ("failure to present any devel-

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[5] Nothing in § 216(b) requires "certification."

oped argumentation" resulted in waiver); *Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004) ("Failure adequately to brief an issue on appeal constitutes waiver of that argument.") This Court has observed that "[t]he imperatives of a dispute capable of judicial resolution are sharply presented issues . . and parties vigorously advocating opposing positions." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980). Here, Tyson has made an unsupported assertion and therefore not presented the issue at all.

Moreover, Tyson's bald assertion is contradicted by the authorities it cites. After asserting that the standards under § 216(b) "can be *no less stringent*" than under Rule 23(b)(3), Tyson cites a single court of appeals decision and for the different proposition that assessing whether employees are "similarly situated" for purposes of § 216(b) "requires an analysis *similar to* that under Rule 23(b)(3)." Pet. Br. 26 (emphasis added). And in the cited decision, Judge Posner acknowledges that his position is contrary to that of the Sixth and Eleventh Circuits. *Espenscheid*, 705 F.3d at 772. Moreover, the one court of appeals decision cited for support in *Espenscheid* actually states:

> Congress clearly chose not to have the Rule 23 standards apply to class actions under the ADEA, and instead adopted the 'similarly situated' standard. To now interpret this 'similarly situated' standard by simply incorporating the requirements of Rule 23 (either the current version or the pre-1966 version) would effectively ignore Congress' directive.

Thiessen v. General Electric Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001).[6] Indeed, just three months before *Espenscheid* issued, the Third Circuit noted that *no* court of appeals had adopted a standard for applying the "similarly situated" test derived from Rule 23. *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 536 (3d Cir. 2012).

The only other authority concerning § 216(b) Tyson cites is 7B Wright & Miller, Federal Practice and Procedure § 1807. Pet. Br. 27 n. 3. But Wright & Miller state, "Most courts have held that the Rule 23 certification requirements do not apply in collective actions" under § 216(b). *Id.* at 479. The treatise specifically notes that "courts also have held that the 'similarly situated' standard is less stringent than the requirement of Rule 23(b)(3), which specifies that common questions of law and fact predominate." *Id.* at 482.

B. Section 216(b) and Rule 23(b)(3) differ on their face, in the scope of their application, and in their operation. Nothing suggests that the same standards should apply under the distinct provisions. In *Genesis*, this Court observed, "there are significant differences between certification[7] under Federal Rule of Civil Procedure 23 and the joinder process under §216(b)." 133 S.Ct. at 1527 n. 1. "Whatever

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[6] The Court did, however, go on to state that "there is little difference in the various approaches." *Id.* That is not correct as we demonstrate in § I(D) *infra*.

[7] This Court did "not express an opinion on the propriety of this use of class-action nomenclature" by some lower courts. 133 S.Ct. at 1527 n. 1.

significance 'conditional certification' may have in §216(b) proceedings, it is not tantamount to class certification under Rule 23." *Id.* at 1532. Indeed, this Court observed, "Rule 23 actions are fundamentally different from collective actions under the FLSA." *Id.* at 1529.

Section 216(b) is a statutory provision[8] that originally applied only to actions brought to enforce the FLSA. FLSA of 1938, Pub. L. No. 75-718, 52 Stat. 1060. Subsequently, the Equal Pay Act was inserted into the FLSA and the Age Discrimination in Employment Act incorporated § 216(b). *See* 29 U.S.C. § 206(d) and 626(b). Thus, the procedures created by § 216(b) are now available only in actions to enforce three federal employment laws while Rule 23 potentially applies to any action brought in federal court.

The policies embodied in the FLSA as well as the two subsequently enacted employment laws incorporating § 216(b) appropriately infuse § 216(b)'s construction in contrast to the relationship between substantive laws and Rule 23. This Court has held that the provisions of the FLSA "are remedial and humanitarian in purpose" and thus the statute "must not be interpreted or applied in a narrow, grudging manner." *Tenn. Coal*, 321 U.S. at 597. This Court has recognized that in § 216(b) "Congress has stated its policy that [FLSA, EPA, and] ADEA plaintiffs should have the opportunity to proceed collectively." *Hoffman-La Roche*, 493 U.S. at 170. And this Court stated with specific ref-

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[8] The Rules Enabling Act thus has no application to the construction of § 216(b).

erence to § 216(b), "The broad remedial goal of the statute should be enforced to the full extent of its terms." *Id.* at 173.

Not only does § 216(b) have a unique origin, distinct purpose, and narrower scope than Rule 23, the procedures and standards created by Rule 23 are entirely distinct from those embodied in § 216(b). Section 216(b) provides:

> An action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.[9]

Section 216(b) does not contain any of the procedural requirements contained in Rule 23(c)-(h)[10] or the sub-

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[9] The section was amended in 1947, but Congress did not in any way alter the "similarly situated" standard. The Senate Report on the amendments made clear, "Collective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may continue to be brought in accordance with the existing provisions of the act." S. Rep. No. 48, 80th Cong., 1st Sess. 49 (March 10, 1947). The Conference Report provided the same. H.R. Rep. No. 326, 80th Cong., 1st Sess. 13 (April 29, 1947). Senator Donnell, chairman of the drafting subcommittee, confirmed this intent on the floor. 93 Cong. Rec. 2,182 (1947).

[10] Similarly, while Rule 23(f) authorizes courts of appeal to permit an appeal from an order granting or denying class certification, the lower federal courts have held that an order granting or denying a request to proceed as a collective action

stantive requirements contained in Rule 23(a) and (b). Likewise, the substantive standard contained in § 216(b)—that the employees be "similarly situated" – is not contained in any of the sections of Rule 23(a) or (b). And the procedural requirement contained in § 216(b)—written consent to become a party plaintiff—is not contained in any of the provisions of Rule 23.

There can also be no suggestion that the standards and procedures in Rule 23 should be read into the earlier-adopted § 216(b). The drafters of the 1966 amendments to Rule 23 that created (b)(3) classes and placed the Rule in its current form specifically stated that "the present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended." Fed. R. Civ. P. 23, advisory committee's note, reprinted in 39 F.R.D. 69, 104 (1966).[11] If the Rule itself was not intended to alter construction of § 216(b) surely subsequent Supreme Court construction of the Rule, such as that in the cases relied on by Tyson, was not either.

C. Congress adopted different standards under Rule 23 and § 216(b) because an action maintained under Rule 23(b)(3) and an action maintained under § 216(b) are distinct in highly significant respects.

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under § 216(b) is not immediately appealable. *See, e.g., McElmurry v. U.S. Bank National Ass'n*, 495 F.3d 1136, 1139-40 (9th Cir. 2007).

[11] In the Court of Appeals, Tyson erroneously argued that Rule 23 actually "governs" FLSA actions, Br. For Appellant at 38 n. 7, failing to cite controlling precedent granting a writ of mandamus directing a district court to vacate an order certifying a Rule 23 class in an FLSA action. *Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975).

First, an action that proceeds as a class action under Rule 23(b)(3) includes all persons within the description of the class who do not opt out while an action that proceeds under § 216(b) includes only those persons who consent in writing to be a party plaintiff. As this Court observed in *Genesis*:

> a putative class acquires an independent legal status once it is certified under Rule 23. Under the FLSA, by contrast, 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees . who in turn become parties to a collective action only by filing written consent with the court.

133 S.Ct. at 1530. Thus, courts need not be concerned about binding absent class members who have not consented to join an action under § 216(b).

Second, the filing of an action as a class action under Rule 23 stays the running of the statute of limitations for all persons within the description of the class while the filing of an action as a collective action under § 216(b) does not do so. *Compare Crown, Cork & Seal, Inc. v. Parker*, 462 U.S. 345, 353-54 (1983), *with* 29 U.S.C. § 256 (FLSA action is not commenced for tolling purposes for any person, even those specifically named in the original complaint, until written consent is filed).

Third, in an action maintained under Rule 23, absent class members are not considered full parties while under § 216(b) each person who files written

consent becomes a "party plaintiff." The Eleventh Circuit observed, "by referring to them as 'party plaintiff[s]' Congress indicated that opt-in plaintiffs should have the same status in relation to the claims of the lawsuit as do the named plaintiffs.'" *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1259 n. 35 (11th Cir. 2008). Thus, one district court observed that under § 216(b) "Plaintiffs are not absent members of a Rule 23 class action, but opt-in plaintiffs under § 216(b) of the FLSA. Having opted into the litigation, [plaintiffs] are not 'passive' in the same sense as absent Rule 23 class members." *Luna v. Del Monte Fresh Produce (Southeast), Inc.*, 2007 U.S. Dist. LEXIS 36893 at *22 (N.D. Ga., 2007). In some jurisdictions, plaintiffs' counsel is required to amend the complaint to add all the individuals who file consent forms as plaintiffs and state claims on their behalf. "Section 216(b) operates in conjunction with Rule 8 of the Federal Rules of Civil Procedure and requires the employee to name the individual plaintiff and allege his or her cause of action in the complaint." *Harkins v. Riverboat Servs.*, No. 99 C 123, 2002 U.S.Dist. LEXIS 19637 at *16-17 (N.D. Ill., May 16, 2002). *See also Becker v. Southern Soils*, No. 6:06-cv-Orl-28JGG, 2006 U.S. Dist. LEXIS 85111 at *2 n.1 (M.D. Fla., Nov. 20, 2006). And in some jurisdictions, each person who files a consent is subject to party discovery (*i.e.*, is obligated to respond to interrogatories and requests for admissions and production). *See, e.g., Ingersoll v. Royal & Sunalliance USA, Inc.*, No. C05-1774-MAT, 2006 U.S. Dist. LEXIS 50912 at 7-8 (W.D. Wash., July 25, 2006) ("the Court is persuaded by the reasoning of courts

permitting individualized discovery of opt-in plaintiffs"); *Coldiron v. Pizza Hut, Inc.*, No. CV03-05865TJHMCX, 2004 U.S. Dist. LEXIS 23610 at *4-5 (C.D. Cal., Oct. 25, 2004).

Finally, in a § 216(b) action, "decertification" should result in severance of all party plaintiffs' claims, while after decertification of a Rule 23 class absent class members must file new actions in order to pursue their claims. *Cf. Lee v. Cook County*, 635 F.3d 969, 971 (7th Cir. 2011) (mis-joinder under Rule 20 results in severance).

D. For the foregoing reasons, the overwhelming majority view is that Rule 23 standards should not be used in applying § 216(b)'s "similarly situated" standard. *See, e.g., Zavala*, 691 F.3d at 536; *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 n. 12 (11th Cir. 1996) ("it is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class action under Rule 23"); *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 519 n. 1 (5th Cir. 2010) ("we have clearly held that not all Rule 23 class action standards are applicable to § 216(b) actions"); *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 584 (6th Cir. 2009) ("Under the FLSA, opt-in plaintiffs only need to be 'similarly situated.' While Congress could have imported the more stringent criteria for class certification under Fed. R. Civ. P. 23, it has not done so in the FLSA.")[12]

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[12] Lower federal courts are unanimous in holding that the decision to permit an action to proceed as a collective action is reviewed using an abuse of discretion standard. *See, e.g., Morgan*, 551 F.3d at 1261-62.

The lower federal courts have specifically held that Rule 23(b)(3)'s predominance requirement is not applicable to § 216(b) actions.[13] The Second Circuit held that the question of whether employees are "similarly situated" "is quite distinct from the question whether plaintiffs have satisfied the much higher threshold of demonstrating that common questions of law and fact will 'predominate' for Rule 23 purposes." *Myers v. Hertz Corp.*, 624 F.3d 537, 556 (2d Cir. 2010). The Court continued, "we are easily able to determine here that the higher predominance standard has not been met without addressing whether the same evidence plaintiffs have put forward in support of Rule 23 class certification could satisfy the lower standard" of "similarly situated." *Id.* The Sixth Circuit held that "unless one excludes Rule 23 predominance from being an implicit requirement for § 216(b) collective actions," the standard "is more demanding than what the statute requires." *O'Brien*, 575 F.3d at 585. "[A]pplying the criterion of predominance undermines the remedial purpose of the [§ 216(b)] collective action device." *Id.* at 585-86. The Eleventh Circuit stated that § 216(b)'s similarly situated requirement "is considerably less stringent than the requirement of [Rule 23(b)(3)] that common questions 'predominate.'" *Grayson*, 79 F.3d at 1096.

E. In the lower courts here, both parties well understood that different standards apply under Rule 23 and § 216(b). In fact, in contrast to its unsupported assertion in this Court, in the District Court, Ty-

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[13] Rule 23(b)(3) (and thus the predominance requirement) did not exist in either 1935 or 1947 when § 216(b) was adopted and amended.

son argued, "These class procedures in the FLSA and Rule 23 are intentionally in contrast to each other." Defendant's Resistance to Plaintiffs' Motion for Class Certification at 6, Dkt. 45. Tyson there asserted that there was a "fundamental inconsistency between the opt-in provisions of the FLSA and the provisions of Rule 23." *Id.*

In the District Court, Plaintiffs made two separate motions—one for class certification under Rule 23 and another to proceed as a collective action under § 216(b). Plaintiffs' Memorandum in Support of Motion for Rule 23 Class Certification, Dkt. 35; Plaintiffs' Memorandum in Support of Motion for Conditional Certification as a Collective Action, Dkt. 34. Tyson filed two separate oppositions. Defendant's Resistance to Plaintiffs' Motion for Class Certification, Dkt. 45; Defendants Brief in Opposition to Plaintiffs' Motion for Conditional Certification as a Collective Action, Dkt. 49. The moving papers and the oppositions cited wholly distinct lines of cases. As a result, the District Court properly analyzed each issue separately. Pet.App. 69a-93a, 93a-110a. In the Court of Appeals, Tyson acknowledged that the Eighth Circuit had "not decided the proper test for determining whether a plaintiff has carried his burden to certify an FLSA class" and stated that "the court need not decide the proper standard." Br. for Appellant at 37, 38 n. 7. Not until the case reached this Court did Tyson make the bald and unsupportable assertion that the standards are identical under Rule 23(b)(3) and § 216(b).

This Court should hold that Tyson waived the § 216(b) issue.

II. The District Court Properly Certified the Class Under Rule 23(b)(3) Despite Variations in Hours Worked Among the "Gang Time" Employees

A. Tyson concedes that all of the requirements for certification of the class under Rule 23(b)(3) were satisfied in this case except one: predominance. But in arguing that the trial court erred in finding predominance, Tyson effectively changes the requirement from one requiring that common questions predominate to one requiring that *all* questions be common.

At the certification stage, the District Court correctly described the non-common questions that existed and correctly weighed them against the common questions as part of the predominance inquiry. The Court found in its initial certification order, "Individual questions may exist, but the court does not believe they predominate." Pet.App. 109a. The Court did not reach that correct conclusion by assuming that the individual questions could be answered "with statistical techniques that presume all class members are identical to the average observed in a sample" as Tyson suggests. Rather, the Court reasoned that while the damage questions were not wholly common to all members of the class, neither were they wholly unique to each individual. The Court found that all the employees "wear some sort of PPE [Personal Protective Equipment], and all store their PPE in the same lockers, at the same plant, and all are required to don and doff their PPE." Pet.App. 99a. The Court reasoned:

> [A]mong gang time paid employees, the evidence only shows factual differences regarding the spe-

> cific PPE these employees wear and the tools they carry. The court does not feel these differences necessitate individualized inquiry to prove a violation because most all gang time employees wear at least the same basic PPE and use some kind of knife or tool. Moreover, there is not an indefinite amount of PPE to don and doff or tools to be used, and thus the factual variations between employees paid via gang time are limited.

Pet.App. 100a-101a. In other words, the District Court concluded that proof of time worked could not be via wholly common evidence, but neither would it require separate evidence for each employee. On that basis, the Court correctly found predominance.

Predominance does not require that there be no individual questions. "Rule 23(b)(3), however, does *not* require a plaintiff seeking class certification to prove that each 'elemen[t] of [her] claim [is] susceptible to classwide proof.' What the rule does require is that common questions '*predominate* over any questions affecting only individual [class] members.'" *Amgen*, 133 S.Ct. at 1196 (quoting Rule 23(b)(3)). The question is not whether any non-common issues exist, the question is whether there is "'some *fatal* dissimilarity' among class members that would make use of the class-action device inefficient or unfair." *Id.* at 1197 (emphasis added). That was clearly not the case here.

Relying on a single sentence in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013), Tyson argues that, even if common questions predominate, the need for individualized damage calculations precludes certifi-

cation. But nothing in the text of Rule 23(b)(3) suggests that result and the single sentence in *Comcast* cannot be read as such a holding. Rather, the single sentence – "Questions of individual damage calculations will inevitably overwhelm questions common to the class" – applies only to the facts of that case. *Id.* at 1433. As Justice Ginsburg pointed out, as a general proposition,

> Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal. *See* 2 W. Rubenstein, Newberg on Class Actions § 4:54, p. 205 (5th ed. 2012) (ordinarily, 'individual damage[s] calculations should not scuttle class certification under Rule 23(b)(3)'). Legions of appellate decisions across a range of substantive claims are illustrative.

Id. at 1437 (Ginsburg, J., dissenting).

A simple example demonstrates that Tyson overreads *Comcast*. Imagine every employee spends a different amount of time donning and doffing protective garments. But imagine Tyson had kept accurate time records of all hours worked. There would still be "[q]uestions of individual damage calculations," but it is clear that they would not "inevitably overwhelm questions common to the class" because the questions would be easily answered. Thus, *Comcast* cannot possibly stand for the categorical proposition advanced by Tyson.

Because it overreads the sentence in *Comcast*, Tyson focuses exclusively on the one factual question it claims is not common to all members of the class—

the number of hours worked each week.[14] But the predominance standard cannot be answered without also considering the common questions and then comparing the two. By doing so, the District Court correctly found predominance.

B. Tyson's argument is actually not about class certification at all. Tyson's argument is about the quality of evidence introduced at trial. This is clear from the very terms in which Tyson framed the question presented—whether a trial court may certify a class "where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample." Pet. Br. i. Liability and damages are not "determined" until trial. In this case, as Plaintiffs demonstrate, the jury found liability and assessed damages based on representative evidence, together with other forms of proof, that permitted a reasonable inference concerning the damages suffered by each class member. There was no "presumption." But even *if* the District Court had permitted liability and damages to be proven at trial with evidence admitted based on such a presumption, it might have constituted an error in the admission of the evidence or the failure to grant a motion for a directed verdict or a new trial,[15] but it would *not* have undermined the ruling granting class certification.

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[14] Tyson argues that there are other individual questions, such as whether some employees were paid for start and end of the day activities, but not only are such employees not "gang time" employees and thus not class members, Tyson's payroll records make answering those questions simple.

[15] This was Tyson's first and primary argument in the Court

At trial, Tyson proposed and the judge gave an appropriate instruction on representative proof. Final Instruction 10 read:

> [I]f some employees testify about the activities they performed or the amount of unpaid time they worked, other non-testifying employees who performed substantially similar activities are deemed to have shown the same thing by inference. This kind of evidence called [sic] 'representative evidence.' . [T]he weight to be accorded the evidence is a function not of its quantity, but of its quality – *whether the testimony covers similarly situated workers*, and is generally consistent. *You may also consider whether the witnesses who testified* worked in or with similar positions and similar departments as the non-testifying employees; whether they *wore similar sanitary and protective items; whether the testifying employees performed donning and doffing activities similarly to non-testifying employees.*

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of Appeals. Tyson's arguments that "Judgment as a matter of law should have been granted to Tyson because Plaintiffs failed to prove overtime liability on a class-wide basis" and that "because Plaintiffs' trial-by-formula approach was improper" and parallel argument that the District Court erred by not granting a new trial consumed 20 of the 27 pages of argument in its Brief and all but three pages in its Reply Brief. Br. for Appellant at 19-38; Reply Br. for Appellant at 4-30. Here, Tyson has improperly recast its argument about the inadequacy of the evidence at trial as an attack on class certification in order to avoid the "two court rule." *See, e. g., Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below.")

J.A. 472 (emphasis added), 93 (Tyson's proposal). *If* the Plaintiffs' evidence did not meet that standard as a matter of law, Tyson could have so argued to the jury,[16] moved for a directed verdict and, if the motion was denied, appealed. In fact, Tyson did all of those things. But a failure of proof at trial does not infect the certification decision.

Tyson's argument is about the quality of the trial evidence: "the lower courts then compounded their error by allowing plaintiffs to 'prove' injury and damages on a classwide basis with statistical sampling that masked these individual differences." Pet. Br. 19. Plaintiffs demonstrate that there was no such error, but, *even assuming* there was, the error was at trial and is not relevant to certification or decertification of the class.

Tyson and its *amici* are wrong when they argue that alleged flaws in the trial evidence undermine the original certification decision or should have constituted grounds for decertification. *See, e.g.*, Dow Br. 9 ("Once a class is certified, the practical realities of trial mean that such individualized differences among class members will never be examined.") The trial court acknowledged the existence of questions not common to all members of the class in its certification decision and, as Plaintiffs demonstrate, those questions were examined at trial and Tyson had every opportunity to explore them more fully. This Court need not alter the standards for certification in order to insure competent evidence is introduced at trial.

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[16] As this Court recognized in *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 340 (1977), "statistics are not irrefutable; . . . they may be rebutted."

C. Appellate courts must review the certification decision from the perspective of the trial judge. A trial judge cannot know what evidence plaintiffs will offer to prove each element of their claim. In fact, plaintiffs' counsel cannot be expected to know, at the certification stage, what evidence they will proffer at trial. A trial judge can and should assess the common questions of law and fact and weigh them against the "questions affecting only individual members" of the putative class and in doing so a trial judge can and should consider the *various ways* in which the latter could be presented.

Thus, it is critical to recognize that while Tyson argues correctly that "Plaintiffs . . must show that they worked more than 40 hours without receiving overtime compensation," Tyson is incorrect when it states that "[t]he latter showing cannot be made with common evidence because individual class members wear different combinations of personal protective equipment that take varying amounts of time to don, doff, and rinse." Pet. Br. 19. That is incorrect or, at best, a gross overstatement, because there is no dispute about the fact that much of the protective clothing worn by employees was common as were many of the other start and end of day activities and the requirement of walking. For that reason, the District Court correctly concluded that Plaintiffs could present proof concerning the not fully common questions at trial without overwhelming the common questions, *i.e.*, that the latter predominated.

Plaintiffs' opening brief demonstrates that the proof actually introduced at trial both confirmed the District Court's earlier finding that the common questions pre-

dominated and provided a sufficient basis for the jury's verdict. Rather than reiterate that argument, we demonstrate here that there were, in fact, numerous ways in which Plaintiffs could have proven damages without the individual questions overwhelming the common questions and thus that the District Court's finding of predominance was correct.

The parties stipulated that all "gang time" employees are required to wear some common items of protective clothing for safety and sanitation purposes. J.A. 119, ¶ 19, 249-50. Further, all processing employees wear a frock and all Slaughter employees a light-color shirt and pants and an apron. J.A. 119, 150, 233. Tyson acknowledges in its brief that the specific items of protective clothing required in each unique position in the plant are listed at J.A. 125-38. Pet. Br. 10. *See also* J.A. 162-64, 241-42. All the unique positions in the plant (e.g., "Gut hogs") are listed on the y axis and each of the unique pieces of protective clothing employees in each position are required to wear are listed on the x axis (e.g., "shin guards"). The chart reveals that there are only 14 unique pieces of protective clothing, J.A. 125-38, 163, *see also* J.A. 74-85, 118-19, of which only 11 were actually worn by employees at the plant. J.A. 163. Using representative proof to demonstrate how long it takes to put on and take off each item, it would have been mechanical to calculate damages for each individual based simply on their position, their wage rate, and Tyson's time and attendance records,[17] even assuming that

[17] In the Court of Appeals, dissenting Judge Beam found that Tyson maintained "adequate attendance, assignment, equipment, work time and payroll records." Pet. App. 121a.

there are more than 420 positions as Tyson suggests. Pet. Br. 4.[18]

Proof of damages did not require that each employee who wore a particular type of protective garment testify about how long it took him or her to don and doff the garment. Testimony from a representative sample of employees required to wear each protective garment would have sufficed.[19] For example, if three representative employees testified about each of the 11 unique garments, there would only have been 33 witnesses and, given the simple nature of the testimony (e.g., "how long did it take you to put on and take off the shin guards"), this testimony would not have been burdensome for the court to receive. Alternatively, an industrial engineer could have studied how long it took a sample of employees to put on and take off each unique garment.[20]

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[18] 420 appears to be the total number of positions and not the total number of "gang time" positions.

[19] Tyson argues that "[n]o court would allow an individual employee to meet his 'burden of proving that he performed work for which *he* was not properly compensated,' . . . by submitting evidence of the amount of time worked by *other* employees who did different activities requiring a different amount of time to perform." Pet. Br. 36. But surely any court would permit representative testimony concerning how long it took each employee to perform the same task rather than requiring thousands of employees to each testify about how long it took them to perform the task.

[20] This is what Tyson's own industrial engineers did to derive the K-code time for each position. *See* J.A. 446-53. The "group manager of industrial engineers for the Pork Division" described this as "a very simple time study." J.A. 452.

Plaintiffs could easily have proved the hours worked by each employee at trial in any number of manners (in addition to the manner actually used) that would not have overwhelmed the fully common questions. Thus, looked at from the certification stage, the District Court was correct when it concluded, "Tyson's possible defenses are not as individualized as Tyson wants the court to believe" and thus that the common questions predominated. Pet.App. 89a.

D. This Court's decision in *Mt. Clemens*, fully supports the foregoing argument, but the forms of representative proof that were and could have been offered in this case were proper *regardless* of whether *Mt. Clemens* applies.

The *Mt. Clemens* Court recognized "that it is the employer who has the duty under § 11 (c) of the Act to keep proper records of wages, hours and other conditions and practices of employment." 328 U.S. at 687. *Mt. Clemens* further recognized that, in the absence of such records, it may be difficult for employees to prove both liability (because liability always depends to some degree on the number of hours worked) and damages. This Court reasoned that the employee "has the burden of proving that he performed work for which he was not properly compensated," *i.e.*, to prove liability, and held that "[t]he remedial nature of this statute and the great public policy which it embodies . . . militate against making *that burden* an impossible hurdle for the employee." *Id.* (emphasis added).

Tyson argues that *Mt. Clemens*' holding does not apply until *after* the employee has proven liability.[21]

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[21] Even accepted, this argument has extremely limited ap-

Similar to its reading of *Comcast*, Tyson does this by taking a single sentence, indeed, in this case, a single part of a sentence, out of context. Tyson points to the following language: "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated." Tyson argues that it is only *after* carrying that burden that the employee can prove the amount of damages he suffered with "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." But such a reading of *Mt. Clemens* would defeat its central holding. When an employer has failed to keep records, it is no less difficult for employees to prove they worked over 40 hours in a work week than it is to prove how many hours over 40 they worked. It would make no sense and wholly undermine the rationale of *Mt. Clemens* to demand exacting proof of the first 40.1 hours worked but not of any additional hours.

Tyson's reading of *Mt. Clemens* is also inconsistent with its actual holding. The evidence the court of appeals found insufficient in that case was not simply evidence of the amount of damage suffered, but evidence that the FLSA was violated. The court of appeals reinstated a master's finding that "the plaintiffs had not established by a fair preponderance of evidence a violation of the [FLSA]." 149 F.2d 461, 464 (6th Cir. 1945). That was the holding reversed by this Court.

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plicability here because it is undisputed that the vast majority of "gang time" employees worked six days a week for at least 48 hours. J.A. 122, 181-82, 326, 437.

Finally, even accepting Tyson's reading of *Mt. Clemens*, nothing in the single phrase Tyson cites suggests that the employee cannot carry "his burden if he proves that he has in fact performed work for which he was improperly compensated" with competent evidence of how long it took other similarly situated employees to perform the same tasks the employee performed. In other words, competent representative proof can be used to prove that an individual employee worked more than 40 hours per week and to prove how many hours over 40 he or she worked per week regardless of the ambit of *Mt. Clemens*' holding.

III. The District Court Properly Certified the Class Even Though It Was Possible That Not Every Employee Would Recover Damages

The second question presented is "Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages." Pet. Br. i. But in its brief, Tyson argues that a court may certify a class only if plaintiffs "show (1) that they can prove with common evidence that *all* class members were injured, *or* (2) that there is a mechanism for identifying the uninjured class members and ensuring that they do not contribute to the size of the damages award and cannot recover damages." Pet. Br. 21 (emphasis added).

Plaintiffs demonstrate that the evidence introduced at trial did "identify[] the uninjured class members and ensur[e] that they d[id] not contribute to the size of the damages award and cannot

recover damages." The jury was specifically instructed that "[a]ny employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages." J.A. 481.[22] We demonstrated in § II(C) *supra* that there were, in fact, multiple "mechanism[s]" that could have been employed at trial "for identifying the uninjured class members [in this case] and ensuring that they do not contribute to the size of the damages award and cannot recover damages." Thus, Tyson's restated standard was clearly met here.

Tyson restates the question to avoid the untenable suggestion that a class cannot be certified if some members may ultimately not recover. To hold that a class cannot be certified if it contains members who might ultimately not sustain a claim that they have a right to damages would read the predominance standard out of Rule 23. To so hold would be to conclude that proof of injury must always be common. That would be inconsistent with the plain text of Rule 23 which makes plain that there may be some "questions affecting only some [class] members" and does not limit the subject matter of those questions. Rule 23(b)(3).

A no answer to Tyson's original question would be starkly inconsistent with the predominance standard because it would mean that if there is *any* non-common issue that might preclude some class members

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[22] Because Tyson filed its notice of appeal before there was any allocation of the jury award to individual class members, it surely cannot argue uninjured class members received damages.

from prevailing, certification cannot be granted. In other words, it suggests that the only question that cannot be common is the *amount* of damages owed each class member. Nothing in Rule 23 supports such a contention.

In fact, accepting Tyson's argument would preclude certification in almost all cases because unique deficiencies of proof and unique defenses are possible, even likely, in almost all cases. This Court concluded in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398, 2412 (2014), that the fact that "defendant might attempt to pick off the occasional class member here or there through individualized rebuttal" does "not render class certification inappropriate." *See also Kohen v. Pacific Investment Management Co.*, 571 F.3d 672, 677 (7th Cir. 2009) ("Such a possibility or indeed inevitability does not preclude class certification."); *In re Nexium Antitrust Litigation*, 777 F.3d 9, 22 (1st Cir. 2015) ("excluding all uninjured class members at the certification stage is almost impossible in many cases").

IV. The District Court Properly Permitted the Action to Proceed as a Collective Action Under § 216(b)

If this Court decides that Tyson has not waived the argument that the District Court abused its discretion by permitting the action to proceed as a collective action under § 216(b), it should nevertheless reject the argument based on its conclusion that Plaintiffs satisfied the more demanding standards of Rule 23(b)(3) as explained in §§ II and III *supra*. And even if this Court finds it necessary to further

construe the "similarly situated" standard despite the complete absence of any colorable argument by Tyson as to its meaning, this Court should conclude that the District Court did not abuse its discretion in holding that the "gang time" employees were similarly situated.

Each of the criteria identified by courts of appeals applying the similarly situated standard support the District Court's conclusion. First, the "gang time" employees are "employed in the same corporate department, division, and location." *Zavala*, 691 F.3d at 537. Second, the employees have similar but not identical "job requirements" and "pay provisions." *Morgan*, 551 F.3d at 1259-60. Third, the employees "advance similar claims." *Zavala*, 691 F.3d at 537. Fourth, the employees were "subjected to some common employer practice[s] that, if proved, would help demonstrate a violation of the FLSA." *Id.* at 538. Fifth, the employees' "claims were unified by common theories of defendants' statutory violations." *O'Brien*, 575 F.3d at 585. Sixth, the employees "seek substantially the same form of relief." *Zavala*, 691 F.3d at 537. Seventh, the "defenses were not so individually tailored to each Plaintiff as to make [the] collective action unwarranted or unmanageable." *Morgan*, 551 F.3d at 1263. Finally, the employees are similarly situated even though "proof of a violation as to one particular plaintiff does not prove that the defendant violated any other plaintiff's rights under the FLSA." *O'Brien*, 575 F.3d at 585.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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